STATEMENT OF

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BEFORE

SUBCOMMITTEE ON SECRECY AND DISCLOSURE

SENATE SELECT COMMITTEE ON INTELLIGENCE

Mr. Chairman and Members of the Committee, it is a pleasure to appear this morning to discuss the use of national security information in criminal proceedings and the related concerns expressed in your letter to me of last December 8.

The subject is many-sided, complex, and I believe not well understood. At the heart of it, however, what we are dealing with is a tension between two vitally important governmental interests which are often difficult and sometime impossible to serve together, so that service to the one may involve a sacrifice of the other. One interest has to do with the effective and impartial administration of criminal justice, with its associated requirement that relevant evidence be available for use by both the prosecution and the defense. On the other side is the interest in the successful administration of foreign and national defense policies of the United States, together with the supporting intelligence functions for which I am responsible and the associated requirements that certain information be protected against disclosure. These interests can and do pull against each other whenever the disclosure demands imposed by the judicial process are met by the contrary imperatives of the intelligence process. The resulting dilemmas can be very painful, and they are not infrequent.

What must be settled at the outset is whether the dilemmas that I perceive are real. If on the scale of national values every law enforcement interest is always superior to any intelligence interest, there could never be much of a problem. Under this view intelligence information would simply be brought forward as needed, either by the prosecution or the defense, no matter what the consequences that might flow from the disclosure of that information at a public trial. If the opposite view were taken, so that law enforcement interests were always seen as subordinate to intelligence interests, there likewise would be little to decide in any given case. It would simply be a matter of terminating any criminal proceeding in whole or in part should any intelligence information be threatened with disclosure.

In my judgment the correct view is neither of the above. The values are so variable that they cannot be abstractly and neatly ordered in advance. The reality is that there are no easy formulas for decision. What that means in practice is that each case must be separately judged on its own facts, and that intelligence interests must be taken into account, along with other such pertinent considerations as justice and precedent, in reaching decisions as to whether and on what basis to proceed with prosecution. Indeed this sort of accounting may have to be repeated several times or at several stages in the same case.

Ultimately, assuming in felony situations that a grand jury is disposed to indict, it is the Attorney General who has the discretion to exercise, the power to act, and therefore the authority to decide whether a prosecution is warranted and on what basis to go forward. That is not to say, however, that I have no role in influencing that decision whenever intelligence interests are concerned. On the contrary, I think I have a necessary role. In the first place, I consider it my responsibility to ensure that no relevant information is withheld from the Attorney General -- that is, that he has access to all information, without regard to classification, that may fairly be thought to bear on the issue of whether a crime may have been committed and under what circumstances it may have been committed. I want to stress this aspect of the subject so as to avoid any possible misunderstanding. Access to relevant information should not be a point of dispute, because the Attorney General has a clear right and need to review all such information so that his decisions may be taken with the fullest factual perspective. Second, I see it as my responsibility to make known to the Attorney General my estimate of the importance of intelligence information that may be identified as relevant to a criminal prosecution, and the potential impacts of the public disclosure of that information. Again, I think that kind of estimate is something the Attorney General must have before him if he is to make informed decisions and properly weigh the consequences of those decisions. If I were to conclude in some particular context that the Attorney General had struck the incorrect balance, my recourse would be to approach the President

so that he could determine as appropriate whether the net best interests of the United States favored prosecution, and so that he would at least be aware of my forecast as to the likely consequences of that course of action. Similarly with respect to the declassification of documents said by the Attorney General to be needed in order to support a prosecution, it seems to me that I should react positively so far as I can do so without endangering vital intelligence interests. But so far as I conclude that the declassification of specific documents would lead to truly damaging national security effects, it seems to me that declassification would be an irresponsible and possibly unauthorized act on my part, except as it might be directed by the President. I should add in this connection that I know of nothing that precludes the use of a classified document as evidence in a judicial proceeding. Indeed the use of a document in that form, assuming it is properly classified to begin with, merely recognizes the situation for what it is, namely one in which a national security risk is being taken to achieve a law enforcement purpose that cannot be achieved in a risk-free way. In short, I cannot accept it as my responsibility to make a real conflict disappear by an act of declassification that pretends that effects of disclosing particular documents will be benign, when I believe the opposite to be true.

Mr. Chairman, there is an impression in some quarters that the relations between CIA and the Department of Justice in this entire field are characterized by hostility and lack of cooperation. I am sure that Mr. Civiletti will offer

his own appraisal on this score when he testifies later this morning, but I would like to give you my own appreciation, which is that relations between CIA and the Department are not at all strained or hostile and indeed are marked by mutual good faith and shared understandings about the dilemmas I am now discussing. Certainly it is true that there is continuing dialogue and debate, and sometimes adversary exchanges, but that is hardly surprising in light of the divergent interests being represented. Usually there is an accommodation. But where there is disagreement, it stems not from poor relations but rather from the intrinsic difficulty of the issues that we confront.

Let me turn now to some of the more fundamental reasons which explain why the issues present such difficulty. Without wanting to stray too far into the legal territory that is more familiar to Mr. Civiletti and other witnesses who will follow me, my own sense is that the reasons are traceable to the nature of the judicial process, procedural safeguards available to an accused in a criminal case, and to some of the criminal laws with which we have to work.

A criminal trial in this country is a public event, and there are constitutional guarantees that make it so. I have no quarrel with those guarantees, but at the same time I cannot ignore the extent to which they contribute to the problem when it comes to making evidentiary uses of intelligence information. When the election is made to use such information, it is on its way into the public domain,

and there are few if any ways to avoid that outcome or to limit the exposure of the information to the actual participants in the trial. Other constitutional provisions secure to an accused broad rights of cross-examination, and the applicable rules of procedure confer on the accused rights of wide-ranging pretrial discovery to look behind the prosecution's case and develop his own defenses. There are not many legal tools available to regulate and control this flow of events just because the information in question happens to be sensitive from a national security standpoint. In addition, these same features make the judicial process almost as uncertain as it is open. For example, what lines of defense will be followed, and what scope of discovery and cross-examination will be allowed, are not matters that lend themselves to precise advance measurement. They are heavily unpredictable, and what that means is that the decision to prosecute is that much more difficult for those who must gauge as best they can, before the course is set, where it all might lead. Again, I am not complaining about any of this, or suggesting any radical reforms that would strip away rights of the accused, all of which exist to assure the fairness of criminal proceedings. I am only trying to describe how things look from where I sit and to put into their true settings the hard choices that have to be made.

What I have said takes on greater force when you consider the necessities of proof under some of the basic criminal statutes that are of special concern

to intelligence agencies. Let us suppose, just as an illustration, that a government employee were to be arrested in the course of delivering a CIA document to a foreign agent, and that the arrest prevented the delivery from being completed, and let us suppose further that the document summarized current Agency operations in another foreign country and that it included a roster of CIA officers in that country. A crime under the espionage laws certainly would have been committed, and that crime must certainly rank high in terms of compelling governmental interests in prosecution. Yet such a prosecution would exact an extraordinary price. As I understand it, the government would be required to show that the information in the document, was of enough significance to materially injure the national security had it fallen into the hands of the foreign agent. That burden of proof would almost surely require that the document itself be offered in evidence, that its accuracy be confirmed by a knowledgeable Agency witness, and that its value be explained. In result, the trial proceedings would have succeeded in doing just what the defendant himself was being tried for having attempted but failed to do, that is to transmit and disclose the information. And the accuracy of that information would have been verified in the bargain. I am sure you will agree that a spectacle of that sort would not be pleasant to contemplate for those who had to struggle with a decision to prosecute.

Unattributable leaks to the press and unauthorized disclosure through attributed publications raise separate but no less troubling problems. On this front there is no statute that is generally applicable, at least none that is clearly applicable, and the lack of clarity in the law is in itself a genuine concern, if for no reason other than that it leaves people in doubt as to their liabilities and may even tend to deter legitimate expression.

Let me also point out that we in the Intelligence Community have legitimate interests on both sides of this issue. On the one hand our concerns for protecting national secrets are genuine; the consequences of invasion of national secrecy can be severe. The most poignant example is that of the agent whose life or freedom is jeopardized by disclosure of his identity. Such individuals have been willing to accept great risks in order to serve our national interests, but they certainly did not sign on with us in the expectation of being exposed publicly by irresponsible citizens acting on their own. Beyond such cases, there is a wide range of clear damage from unauthorized disclosures. In some instances our relations or negotiations with other sovereign nations can be impeded or our access to information important to our interests can be denied. Most significantly, perhaps, is the long term effect such disclosures can have on our national intelligence efforts. Agents simply will not be recruited to an intelligence source that appears to be an information sieve; foreign intelligence organizations simply

will not share their information with such an organization; and extremely expensive technical intelligence collection systems will prove to have been a taxpayer's waste simply because a counter can be constructed for most every system if enough detail about it is disclosed.

At the same time, I urge you to recognize that the seriousness of these losses to unauthorized disclosures give us in our nation's Intelligence Community great cause to support the prosecution of the individuals who do the disclosing. My blood boils at the obvious callousness and selfishness of such persons and I believe they more than deserve the punishment which may result from prosecution. This alone is incentive to lean over backwards in releasing information which is essential to such judicial proceedings. Beyond that, however, we in the Intelligence Community feel that the country desperately needs to prosecute these offenders in the name of deterring others. In the brief year I have been a part of our intelligence organization we have held our breath while releasing data to permit the prosecution of three espionage cases. I assure you that the incentives to release information for the purposes of prosecution are indeed strong.

I would also like to add my strong dissent with the sometimes popular view that in fact encourages individuals to break our laws in the name of "blowing the whistle" on what they as individuals perceive to be improper

performance. I do not question that such whistle blowing has served our national purposes in a few past instances and may again in the future. I would point out, however, that the Congress, in its wisdom over the past two years, has created an alternative to public whistle blowing on intelligence agencies. This is a select committee on intelligence in each chamber of the Congress. Never have I seen these committees deny a citizen's request to report on what he believes to be malperformance. In addition, the Executive Branch has created a corresponding safety valve in the Intelligence Oversight Board, a body totally independent of the Intelligence Community and reporting directly to the President. Thus, with such a body in both of these branches of our government, the citizen has recourse even if he suspects collusion at high levels of one or the other. I would submit that I have yet to see one of these so-called whistle blowers who directed his whistle first at one of these authorized mechanisms. This leads me to suspect that rather than being patriotic heroes as some are want to describe them, these individuals are more likely to be self serving charlatans in quest of fame or fortune. In short, it is my view that we have the mechanisms for ensuring that the individual citizen need not feel that he must take it unto himself to judge what is a national secret and what is not. If we do not curb this view, which by its logical extension means that 215 million Americans have the right and ability to pass upon our national secrets, we will degenerate into chaos in this vital zone of national defense.